Supreme Court, U.S.
FILED

No. 09-922 FEB 1 - 2010

OFFICE OF THE CLERK
William K. Suter, Clerk

In The

Supreme Court of the United States

DAVE JORDAN,

Petitioner,

vs.

APACHE CORPORATION and
ISLAND OPERATING COMPANY, INC.,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit**

PETITION FOR WRIT OF CERTIORARI

JAMES T. LISTON
Counsel of Record
FRANCIS I. SPAGNOLETTI
401 Louisiana Street, 8th Floor
Houston, Texas 77002-1629
Telephone: (713) 653-5600
Facsimile: (713) 653-5656

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Do the owners and operators of platforms located on the Outer Continental Shelf have a negligence-based duty to monitor radios and communicate with visiting helicopters, in order to ensure the safe arrival and disembarkation of visiting workers?

2. Do the owners and operators of platforms located on the Outer Continental Shelf have a negligence-based duty to ensure that workers who are summoned to perform work on the platform are given a safe workplace, which includes assistance necessary to unload and transport equipment which the worker brings with him in order to complete the work?

PARTIES TO THE PROCEEDING

Petitioner, Dave Jordan, was Plaintiff in the District Court and Appellant in the Court of Appeals.

Respondents, Apache Corporation and Island Operating Company, Inc., were Defendants in the District Court and Appellants in the Court of Appeals.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINION AND JUDGMENT BELOW	1
STATEMENT OF JURISDICTION	2
FEDERAL STATUTE INVOLVED	2
INTRODUCTION	4
FACTUAL BACKGROUND AND STATEMENT OF THE CASE	7
REASONS FOR GRANTING WRIT	12
CONCLUSION	18

APPENDIX

Opinion of Fifth Circuit Court of Appeals, 332 Fed. Appx. 992 (5th Cir. Oct. 8, 2009) ..... App. 1

Final Judgment of District Court, filed March 24, 2009 ..... App. 3

District Court's Order denying motion for reconsideration, filed March 12, 2009 ..... App. 4

Order of the U.S. District Court, Southern District of Texas, Galveston Division, filed March 2, 2009 ..... App. 5

Fifth Circuit Court of Appeals' denial of Petition for Rehearing, November 2, 2009 ..... App. 22

TABLE OF AUTHORITIES

Page

U.S. SUPREME COURT CASES

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 12, 13

Brosseau v. Haugen, 543 U.S. 194 (2004) 12

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 12

FEDERAL COURT OF APPEALS CASES

Jordan v. Apache Corp., 332 Fed. Appx. 992 (5th Cir. 2009) (unpublished) 1, 2, 5, 12

Roberts v. Cardinal Servs., 266 F.3d 368 (5th Cir. 2001) 13

LOUISIANA STATE CASES

Mosley v. Temple Baptist Church of Ruston, La., Inc., 920 So.2d 355 (La. 2006) 6, 14, 17

Mundy v. Dept. of Health & Human Resources, 620 So.2d 811 (La. 1993) 13, 14, 17

FEDERAL STATUTES

28 U.S.C. § 1254 2

33 U.S.C. §§ 901-933 (LHWCA) 11

43 U.S.C. §§ 1331, *et seq.* (OCSLA) 2, 6, 11, 13

LOUISIANA STATE STATUTES

La. Civ. Code arts. 2315, 2316 14

TABLE OF AUTHORITIES – Continued

Page

RULES OF COURT

Fed. R. Civ. P. 56 ..... 12, 14, 16, 17

Sup. Ct. Rule 13(1) 2

Fifth Circuit Local Rule 47.5.4 1

PETITION FOR WRIT OF CERTIORARI

Petitioner Dave Jordan seeks this Court's review of the *per curiam*, unpublished Opinion issued by the Court of Appeals for the Fifth Circuit, 332 Fed. Appx. 992 (5th Cir. Oct. 8, 2009), App. 1-2, respectfully showing:

OPINION AND JUDGMENT BELOW

The order of the United States District Court for the Southern District of Texas, Galveston Division, dismissing Petitioner's case on summary judgment was filed March 2, 2009. It is unpublished and appears herein as App. 5-21. The District Court thereafter denied Petitioner's motion for reconsideration on March 12, 2009, which appears herein as App. 4, and issued a final, take-nothing judgment against Petitioner on March 24, 2009. App. 3.

The *per curiam* opinion of the Fifth Circuit Court of Appeals, signed October 8, 2009, affirming the District Court's judgment, was not selected for publication in West's Federal Reporter but appears at 332 Fed. Appx. 992 (5th Cir. 2009), and lacks precedential value under Fifth Circuit Local Rule 47.5.4. App. 1-2. The Court of Appeals denied a timely filed motion for rehearing on November 2, 2009. App. 22.

STATEMENT OF JURISDICTION

The Court of Appeals for the Fifth Circuit issued its *per curiam*, unpublished opinion on October 8, 2009, 332 Fed. Appx. 992 (5th Cir. 2009), App. 1-2, and thereafter denied a timely filed motion for rehearing on November 2, 2009. App. 22. The Supreme Court possesses jurisdiction under 28 U.S.C. § 1254 because this Petition was filed within 90 days following the issuance of the final decision of a United States Court of Appeals. 28 U.S.C. § 1254; Sup. Ct. Rule 13(1).

FEDERAL STATUTE INVOLVED

Outer Continental Shelf Lands Act of 1953, 43 U.S.C. § 1333(a) (Laws and regulations governing lands)

(a) Constitution and United States laws; laws of adjacent States; publication of projected State lines; international boundary disputes; restriction on State taxation and jurisdiction

> (1) The Constitution and laws and civil and political jurisdiction of the United States are extended to the subsoil and seabed of the outer Continental Shelf and to all artificial islands, and all installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon for the purpose of exploring for, developing, or producing resources therefrom, or any such installation or other device (other than

a ship or vessel) for the purpose of transporting such resources, to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State: Provided, however, That mineral leases on the outer Continental Shelf shall be maintained or issued only under the provisions of this subchapter.

(2) (A) To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted, the civil and criminal laws of each adjacent State, now in effect or hereafter adopted, amended, or repealed are declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf, and the President shall determine and publish in the Federal Register such projected lines extending seaward and defining each such area. All of such applicable laws shall be administered and enforced by the appropriate officers and courts of the United States. State taxation laws shall not apply to the outer Continental Shelf.

(B) Within one year after September 18, 1978, the President shall establish procedures for setting [sic] any outstanding

> international boundary dispute respecting the outer Continental Shelf.
>
> (3) The provisions of this section for adoption of State law as the law of the United States shall never be interpreted as a basis for claiming any interest in or jurisdiction on behalf of any State for any purpose over the seabed and subsoil of the outer Continental Shelf, or the property and natural resources thereof or the revenues therefrom.

INTRODUCTION

This Petition arises from a summary judgment that dismissed Petitioner's personal-injury claim against two parties at interest with an offshore platform located in Louisiana's portion of the Outer Continental Shelf at South Timbalier Block 295A: Respondents Apache Corp. ("Apache") and Island Operating Co. ("Island Operating"). Respondent Apache owned the platform; Respondent Island Operating managed it. Petitioner Dave Jordan – a valve technician – injured his back when he arrived by helicopter at the platform to work without a helper and was forced to carry a heavy toolbox down a flight of stairs without any assistance. Although Respondents knew Petitioner would be arriving at the platform with heavy tools to accomplish his work, they did not provide Petitioner with a safe place to work because they failed to either (a) dispatch with

Petitioner, a helper to assist him in carrying the heavy equipment from the helicopter to the lower level of the platform, or (b) ensure that persons on the platform were ready and waiting to assist Petitioner in unloading the equipment when he arrived. Respondents' failure to furnish a safe working environment was compounded by the fact the platform operator, Respondent Island Operating, failed to monitor the radio in order to keep itself apprised of the arrival of visiting workers. As a result of Respondents' neglect of their duties, Petitioner was forced to lug a 95-pound toolbox down a flight of stairs without assistance, injuring himself.

Notwithstanding the ample evidence of negligence, the District Court dismissed Petitioner's suit on summary judgment on grounds that neither Respondent owed Petitioner a duty as a matter of law. By narrowly focusing on the fact Petitioner carried his own tool box, it essentially concluded Petitioner caused his own injury. App. 5-21. The Fifth Circuit Court of Appeals summarily affirmed in an unpublished, *per curiam* opinion. 332 Fed. Appx. 992. App. 1-2.

This Petition presents at least two legal questions about the scope of the duty owed to a worker by platform owners and operators under the Outer Continental Shelf Lands Act.

First, this Petition raises the issue of the scope of the duty that platform owners and operators owe to workers who they ask to perform work on their

platforms. It is a well-established proposition that a premises owner owes a worker a negligence-based duty to ensure he has a safe place to work. *Mosley v. Temple Baptist Church of Ruston, Louisiana, Inc.*, 920 So.2d 355 (La. 2006). This Petition asks this Court to recognize that the duty of providing a safe workplace includes providing the worker all necessary assistance to unload and transport his equipment upon arrival at an offshore platform.

Second, this Petition raises the policy issue of a platform owner/operator's duty to maintain communications with visiting workers who arrive by helicopter. This issue merits this Court's review because it presents a recurring occurrence on platforms located on the Outer Continental Shelf, which is under federal jurisdiction by virtue of the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331, *et seq.* (OCSLA). Allowing the District Court's summary judgment to stand unaltered creates a precedent under which platform owners/operators may be encouraged to neglect communications with arriving helicopters. The policy issue concerning the scope of a platform owner/operator's duty to monitor a radio and keep abreast of workers arriving by helicopter – in an area governed by federal statute – militates against summary disposition and warrants a remand for further consideration on the merits.

FACTUAL BACKGROUND AND STATEMENT OF THE CASE

Respondent Apache is an independent energy company that explores for, develops and produces natural gas, crude oil and natural gas liquids.[1] Apache produces these commodities from platforms located in the coastal waters along the Gulf Coast.[2] Apache hires various companies to maintain and operate these platforms on its behalf;[3] it contracted with Respondent Island Operating to operate its platforms pursuant to a master service agreement.[4]

Petitioner Dave Jordan was employed as a valve technician by a third party in January 2007.[5] In mid-January 2007, Jordan's employer assigned him to travel by helicopter to an Apache platform located off the Louisiana coast.[6] Petitioner was transported to this platform and remained there for several days.[7]

On the morning of January 20, 2007, an Island Operating employee noticed that a surface safety

---

[1] Doc. 57 (Apache's Motion for Summary Judgment); R 265.

[2] *Id.*

[3] *Id.*

[4] Docs. 59-7 and 59-8 (Island Operating's motion for summary judgment).

[5] Doc. 25 (first amended complaint); R 148-152; R 469 (Plaintiff's deposition testimony at p. 7).

[6] Doc. 57 (Apache's motion for summary judgment); R 265-267.

[7] *Id.*, *see also* R 474 (Plaintiff's deposition testimony at pp. 26-27).

valve was leaking on another Apache platform, located at South Timbalier 295A.[8] This information was relayed to Apache's area foreman, who was responsible for arranging third-party contractors to repair equipment on its platforms and for arranging transport for contractors to reach its platforms. Apache's area foreman instructed Petitioner's employer to dispatch Petitioner to Apache's platform at South Timbalier 295A.

Thereafter, a helicopter arrived at the Apache platform to transport Petitioner Jordan to South Timbalier 295A.[9] Petitioner loaded his toolbox and a duffel bag onto a helicopter and boarded it. Approximately 35 minutes later, Petitioner arrived at South Timbalier 295A.[10] Petitioner did not have a helper. Respondents never sent one. He disembarked the helicopter and first removed his duffel bag. He then returned to the helicopter to offload his toolbox.

Petitioner injured his back as he was carrying his 95-pound toolbox down the adjacent stairs.[11] He was forced to move fast due to the approach of bad weather, and the necessity for the helicopter to depart

---

[8] Docs. 57, 59-2, 59-7 and 61.

[9] Doc. 57; R 266.

[10] *Id.*

[11] Jordan estimated that his toolbox weighed 95 pounds (deposition at pp. 31, 44; R 475, 478) and was approximately 16-18 inches long by 12 inches wide (*id.* at pp. 25-26; R 473-474).

the platform before the bad weather arrived; he was not assisted by platform workers.

The evidence presented showed that Respondents were negligent in at least two aspects. First, despite the fact that Respondents actively solicited Petitioner's presence on the rig in order to perform repair work, neither Respondent ensured that Petitioner was given a safe work environment. Specifically, neither took steps to ensure that a helper was dispatched with Petitioner who could assist in the unloading and transport of the heavy tools needed to complete the job Petitioner was expected to perform. Second, neither Respondent communicated the details of Petitioner's arrival to each other, and neither Respondent had a policy in place to have assistance ready and waiting for the arrival of contractors visiting the platform. As a result, no help was sent, and no help was waiting. Petitioner thus lacked a safe place in which to work because he was forced to carry a heavy toolbox down the stairs without assistance.[12]

The evidence presented in the summary judgment proceeding showed that Respondent Island Operating failed to have a policy requiring its platform workers to provide assistance to visiting

---

[12] R 469, 476, 480, 482 (Exhibit 1 to Plaintiff's Summary Judgment Response, deposition of Plaintiff, at pp. 9, 37, 51-53, 61).

technicians such as Petitioner.[13] The evidence also showed that Respondent Apache failed to have a policy requiring its platform operator (*i.e.*, Island Operating) to assist visiting technicians. This was true notwithstanding the fact that Apache – having specifically solicited Petitioner to work on the platform – was in the best position to know Petitioner would soon be arriving with a load of heavy tools and doubtless need assistance.[14] Although both Respondents knew Petitioner was on his way to the platform bearing tools, they failed to ensure that he was dispatched with sufficient assistance, and failing that, they failed to communicate in order to arrange suitable assistance upon his anticipated arrival. For example, the platform operator failed to monitor the radio in order to keep itself apprised of the arrival of visiting workers. The Platform operator not only failed to monitor the radio, but could and should have made a radio call to the approaching helicopter to determine its anticipated arrival time at the platform.

Petitioner injured his back when carrying the tools down the heliport stairs. As found by the District Court, he reported his accident and completed an accident report.[15]

---

[13] *Id.* at p. 67.

[14] *Id.* at p. 67.

[15] Doc. 59-7 at p. 4.

Petitioner filed the underlying lawsuit in January 2008 in the United States District Court for the Southern District of Texas, Galveston Division, alleging personal injury claims under the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. §§ 1331, *et seq.* and the Longshore and Harbor Workers Compensation Act (LHWCA), 33 U.S.C. §§ 901-933.[16] These statutes provide negligence-based causes of action to persons injured on offshore platforms, based on the law of the adjoining state. The parties agree Louisiana state substantive law applies to Petitioner's claim, being the applicable law of the adjacent state.[17]

Respondent Island Operating moved for summary judgment on grounds it had no duty to protect Petitioner by ensuring he did not attempt to carry his own toolbox down a flight of stairs on the platform.[18] Similarly, Respondent Apache moved for summary

---

[16] Docs. 1, 25 (complaint and first amended complaint).

[17] *See* 43 U.S.C. § 1333 ("To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted, the civil and criminal laws of each adjacent State, now in effect or hereafter adopted, amended, or repealed are hereby declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf . . . ").

[18] Island Operating's Memo in Support of Summary Judgment (Doc. 59-4) at p. 10.

judgment on grounds that it owed Petitioner no duty under Louisiana negligence law and that there was no defective condition on the platform. The District Court granted both motions for summary judgment, and later signed a final judgment dismissing Petitioner's suit in its entirety. App. 3, 5-21. The Fifth Circuit Court of Appeals affirmed this decision in an unpublished, non-precedential opinion. 332 Fed. Appx. 992 (5th Cir. 2009); App. 1-2.

REASONS FOR GRANTING WRIT

The District Court improperly granted summary judgment given the existence of disputed fact issues, Fed. R. Civ. P. 56, and the Court of Appeals should have reversed and remanded the case for further consideration of the legal scope of the duty and the underlying policy consideration of the need to maintain communications between helicopters and offshore platforms, and the obligation of platform owners and operators to provide a safe platform on which their contractors can perform their services. Because this case arises out of the District Court's grant of summary judgment, "we are required to view all facts and draw all reasonable inferences in favor of the nonmoving party." *Brosseau v. Haugen,* 543 U.S. 194, 195, n. 2 (2004) *(per curiam)*. Summary judgment is appropriate only where there is no genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). In determining

whether a material factual dispute exists, the Court views the evidence through the prism of the controlling legal standard. *Liberty Lobby*, 477 U.S. at 248. In this case, the evidence clearly presents several genuine issues of material fact that make summary judgment improper.

The decision below reflects an improper application of law. The District Court applied Louisiana state law of negligence – which governs this personal-injury case by virtue of section 1333 of the Outer Continental Shelf Lands Act – and found that neither Respondent was negligent with respect to Petitioner. Specifically, it found that Respondent Apache did not exercise any "operational control"[19] over Jordan's work and hence was not liable, and at the same time found that Respondent Island Operating had no duty to Petitioner and hence was not liable as a matter of law.

Under Louisiana law, whether a duty exists is a question of law, while breach of duty is a question of fact. *Mundy v. Dept. of Health & Human Resources*, 620 So.2d 811, 813 (La. 1993). The District Court found no duty as a matter of law. Louisiana law generally provides that an entity is responsible for its

---

[19] *See Roberts v. Cardinal Servs.*, 266 F.3d 368, 380 (5th Cir. 2001) (under Louisiana state law, a principal is not liable for the torts committed by an agent who is an independent contractor in the course of performing his contractual duties, unless the activity is ultrahazardous in nature or the principal maintains operational control over it).

acts that cause damage to another. La. Civ. Code arts. 2315, 2316. The owner or operator of a facility has the duty of exercising reasonable care for the safety of persons on his premises and the duty of not exposing them to unreasonable risks of harm or injury. *Mundy*, 620 So.2d at 813; *Mosley v. Temple Baptist Church of Ruston, Louisiana, Inc.*, 920 So.2d 355 (La. 2006). In this case, the summary judgment should be reversed so that the issue of the scope of Respondents' *legal duty* can be considered. Fed. R. Civ. P. 56.

A. Respondents were negligent in their operational control of the platform, including the transport of Petitioner to the platform.

The District Court's Order (App. 5-21) improperly isolates Petitioner's act of carrying his toolbox down the heliport stairs as the extent of the Respondents' "operational control." App. 15. In short, the District Court concluded that Petitioner was solely responsible for carrying his toolbox, and hence, Defendants could not have been negligent. The District Court erred because the issue of "operational control" extends to cover Petitioner's *transport to, arrival at, and alightment to the platform from the helicopter*. The District Court's summary judgment thus reflects a misapplication of law. Respondents arranged Petitioner's air transport to the platform and did not protect him because they failed to dispatch sufficient assistance to allow Petitioner to complete the task, and failing that, never communicated with each other

to ensure personnel would be ready and waiting to assist him upon his arrival.

The deposition testimony of Island Operating's president and owner, Gregg Falgout[20] demonstrates that Respondents knew Jordan would be arriving at the platform with heavy tools.[21] Both Respondents denied responsibility for the fact Petitioner was forced to carry his heavy tools without assistance because each claimed ignorance of the exact time he would arrive. Communication, including monitoring of the radio, or the transmission of a radio call to the approaching helicopter, would have prevented this. The need to maintain communication between an offshore platform and visiting helicopters is an important issue of public policy (*i.e.*, the degree of care to be exercised by the owner/operator of an offshore platform), and it made summary judgment further inappropriate.

Respondent Island Operating was negligent and breached its duty of care to Petitioner because it essentially kept itself ignorant about the arrival of

---

[20] Falgout's deposition testimony was attached to Plaintiff's motion for reconsideration and/or modification. Doc. 71; R 636-649.

[21] Falgout, testified that someone from Island Operating noticed that a SSV (subsurface safety valve) was leaking on the platform, and needed to be repaired by a valve man. R 640 (Falgout deposition pp. 19-21). Island Operating contacted Apache, and Apache decided what technician would perform the repair. *Id.* (deposition p. 20). Apache then made arrangements to send the repairman to the platform by air. *Id.* (deposition p. 21).

helicopters in that it failed to monitor radio traffic, and failed to place a radio call to the helicopter. This is evidenced by the testimony of Gregg Falgout,[22] who testified that if someone on the platform wanted to contact a helicopter by radio, there was a radio in the platform office that could be used to contact it and that if Island Operating wanted to, it could call a platform-bound helicopter, learn its time of arrival, and then have a person waiting on the helipad to greet the incoming contractor.[23] The evidence is clear that the platform operator – Island Operating – simply did not monitor the platform radio, or place a call to the helicopter, leaving it in the dark about the time of arrival.

The failure of a platform operator to monitor radio traffic to ensure the safety of workers arriving by helicopter is an important matter of policy that merits further proceedings on the merits and militated strongly against summary disposition of the case under Rule 56.

---

[22] R 647 (there was no individual who worked in the office during the day where the radio was located; although there are limited times when platform personnel would be working in the office where the radio is located, "other than that, they should be on the deck.").

[23] R 644-645 (Falgout deposition).

B. Respondents breached their duty to furnish a safe place to work, which includes providing all necessary assistance to safely perform the job.

Apart from their failure to monitor radio traffic and communicate the details of Petitioner's trip to the platform, Respondents were negligent in failing to ensure that Petitioner was given a reasonably safe workplace. Under controlling Louisiana negligence law, the owner or operator of a facility has the duty of exercising reasonable care for the safety of persons on his premises and the duty of not exposing them to unreasonable risks of harm or injury; this is especially true for business invitees, such as Petitioner. See *Mundy*, 620 So.2d at 813; *Mosley*, 920 So.2d 355. In particular, Respondent Apache – the party who dispatched Petitioner – failed to send a helper to help Petitioner carry the heavy equipment needed to perform his job, or if it chose not to send help, failed to ensure that persons already on the platform were ready and waiting to assist Petitioner in unloading the equipment upon his arrival.

As shown by the summary judgment evidence, a genuine issue of material fact exists as to whether Respondents were negligent with respect to Petitioner's accident. This made summary judgment improper. Fed. R. Civ. P. 56. The summary judgment evidence raises questions about the scope of the legal duty owed by the Respondents, both the duty to provide a safe workplace as well as the duty to communicate in order to arrange a proper personnel

alightment onto the platform. Moreover, Respondents' failure to monitor radio traffic triggers federal policy concerns about safety on offshore platforms on the Outer Continental Shelf. For all these reasons, the District Court's granting of summary judgment was improper and the case should be remanded for further considerations on the merits.

CONCLUSION

Respondents Apache and Island Operating were negligent and breached their duties of care to Petitioner because they failed to provide Petitioner with the items necessary to safely complete his task. This failure was compounded by Respondents' failure to communicate with each other to arrange Petitioner's effective alightment from the helicopter. The summary judgment evidence confirms that Respondents failed to take reasonable steps to furnish Petitioner a safe working environment. As such, the summary judgment evidence presented herein raised a genuine issue of material fact as to the liability of both Respondents under Louisiana negligence law and this case should not have been disposed on summary judgment. Although, at first blush, this case may appear to involve merely a summary judgment fact issue, it rises to the level of this Court's review because it involves the legal scope of the duty of a platform owner/operator and presents a recurring

occurrence on work platforms located on the Outer Continental Shelf.

WHEREFORE, Petitioner prays that this Court reverse the Court of Appeals's judgment and remand this case to the District Court for further proceedings on the issue herein presented. Petitioner prays for all other relief to which he is justly entitled.

Respectfully submitted,

JAMES T. LISTON
FRANCIS I. SPAGNOLETTI
401 Louisiana Street, 8th Floor
Houston, Texas 77002-1629
Telephone: (713) 653-5600
Facsimile: (713) 653-5656

Counsel for Petitioner

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 09-40414
Summary Calendar

DAVE JORDAN,

Plaintiff-Appellant

v.

APACHE CORP;
ISLAND OPERATING COMPANY INC.,

Defendants-Appellees

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 3:07-CV-58

(Filed Oct. 8, 2009)

Before REAVLEY, JOLLY, and OWEN, Circuit Judges.

PER CURIAM:*

The judgment of the district court is affirmed. The plaintiff has failed to raise an issue of negligence

---

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

by either Apache or Island Operating. Counsel would charge these defendants with a legal duty to foresee all of the circumstances that led the plaintiff to carry the toolbox and to take action to guard against any injury to him. The failure to do this, or to publish a policy requiring it, cannot be said to be unreasonable or violation of duty to Mr. Jordan.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

DAVE JORDAN	§	C.A. No.
	§	3:07-CV-00058
v.	§	
APACHE CORPORATION, et al.	§	

FINAL JUDGMENT

(Filed Mar. 24, 2009)

On this day came on to be heard Defendants' Motion for Entry of Final Judgment. After considering the Motion, the Court is of the opinion that it is in all things proper and should be granted.

IT IS THEREFORE ORDERED that the Plaintiff DAVE JORDAN take nothing by his suit, and that Defendants APACHE CORPORATION and ISLAND OPERATING COMPANY, INC. be in all things discharged. All costs of Court are taxed against the party incurring same.

All other relief not expressly granted in this judgment is denied. This is a Final Judgment.

SIGNED this 24th day of March, 2009.

/s/ [Signature Illegible]
THE HONORABLE
VANESSA D. GILMORE
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

DAVE JORDAN	§	CIVIL ACTION
VS.	§	NO. 3:07-cv-058
	§	
APACHE CORP., et al	§	

ORDER

(Filed Mar. 12, 2009)

ON THIS DAY came on for consideration Plaintiff's Motion for Reconsideration and/or Modification the Court's Order of March 2, 2009, which Motion is hereby DENIED.

IT IS SO ORDERED.

This 12th day of March, 2009.

/s/ [Signature Illegible]
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS GALVESTON DIVISION

DAVE JORDAN,	§	
Plaintiff,	§	
	§	**CIVIL ACTION**
versus	§	**NO. G-07-58**
APACHE CORP., *et al.*,	§	
	§	
Defendants.	§	

ORDER

(Filed Mar. 2, 2009)

Pending before the Court is Defendant Apache Corporation's and Defendant Island Operating Company Inc.'s Motions For Summary Judgment. (Instrument Nos. 57, 59).

I.

A.

Plaintiff Dave Jordan ("Plaintiff" or "Jordan") brings the instant suit for damages against Defendants Apache Corporation ("Apache"), Island Operating Company, Inc. ("Island Operating Co."), and Petroleum Helicopters, Inc. ("Petroleum Helicopters") (collectively, "Defendants"). (Instrument No. 25, at 1-2). Plaintiff alleges that he suffered personal injury on January 20, 2007 due to Defendants' negligence. (*Id.*).

B.

Defendant Apache is an independent energy company that explores for, develops and produces natural gas, crude oil and natural gas liquids. (Instrument No. 57, at 1). Apaches [sic] produces these commodities from platforms located in the coastal waters along the Gulf Coast and elsewhere. (*Id.*). Apache has hired various companies to maintain and operate these platforms on Apache's behalf. (*Id.*). Since January 31, 2005, Apache has contracted with the Wood Group Production Services ("Wood Group") to provide valve services on Apache's offshore production platforms. (*Id.*, at 1-2; Instrument No. 57-2, at 2). Apache has also contracted with Island Operating Co. to operate Apache's platforms pursuant to a Master Service Agreement. (Instrument Nos. 59-7, 59-8).

Plaintiff was employed as a value technician by Wood Group in January 2007. (Instrument No. 25, at 2; Instrument No. 57, at 1). On January 15 or January 16, 2007, Wood Group assigned Plaintiff to travel by helicopter to an Apache platform located off the coast of Louisiana at Grand Isle Block 116. (Instrument No. 57, at 1). Plaintiff was transported to this platform and remained there for approximately four or five days. (*Id.*).

On the morning of January 20, 2007, Island Operating Co. employee John Taylor noticed that a surface safety value was leaking on another Apache platform, located in the Gulf of Mexico at South Timbalier 295A. (Instrument No. 57, at 2; Instrument

No. 59-2, at 1-2; Instrument No. 59-7, at 3; Instrument No. 61, at 1). Mr. Taylor reported this leaking value to Scott Barnard, Island Operating Co.'s lead operator on the platform. (Instrument No. 59-2, at 1-2; Instrument No. 59-7, at 3). Mr. Barnard, in turn, reported the issue to Brian Sinclair, the Area Foreman for Apache, who was not physically present on the platform (*Id.*). Mr. Sinclair was responsible for arranging third party contractors necessary to repair equipment on Apache's platforms, and to arrange transportation for contractors to be transported in the field. (*Id.*; Instrument No. 59-7, at 3). Subsequently, Mr. Sinclair instructed Wood Group's lead operator to dispatch Plaintiff to Apache's platform at South Timbalier 295A. (*Id.*). Mr. Sinclair also arranged for Petroleum Helicopters to transport Plaintiff to South Timbalier 295A. (*Id.*; Instrument No. 57, at 2; Instrument No. 61, at 1).

A helicopter owned and operated by Defendant Petroleum Helicopters arrived at the Apache platform located at Grand Isle Block 116 to transport Plaintiff to South Timbalier 295A. (Instrument No. 57, at 2). Plaintiff loaded his toolbox and a small duffel bag onto the helicopter and boarded it. Approximately thirty-five minutes later, Plaintiff arrived at the Apache platform located at South Timbalier 295A. Plaintiff disembarked the helicopter and first removed his duffel bag. (*Id.*). Plaintiff then returned to the helicopter to unload his toolbox. As Plaintiff attempted to lift the toolbox and carry it down the adjacent stairs, he allegedly felt "something pop" in

his back and fell forward onto both knees. (*Id.*; Instrument No. 57-5, at 22). Plaintiff claims that the helicopter pilot was encouraging him to "hurry up" because bad weather was approaching them. (Instrument No. 57-5, at 6-8).

Plaintiff reported the incident and filled out an accident report with the assistance of Mr. Barnard. (Instrument No. 59-7, at 4). He stated that he was unable to perform in the valve repair due to the injury, and a helicopter transported Plaintiff back to shore. (*Id.*).

C.

Plaintiff brought suit on January 31, 2007 and amended his Complaint on January 15, 2008. (Instrument Nos. 1, 25). Plaintiff alleges that Defendants negligently caused his injuries, as Defendants had the "right of control over" the work that he performed. (Instrument No. 25, at 3). Plaintiff claims that as a result of Defendants' negligence, he suffered and will continue to suffer bodily injuries, physical pain and mental anguish, physical impairment and disfigurement, loss of earrings, and medical expenses. (*Id.*, at 3-4).

Defendant Apache moved for summary judgment on August 1, 2008. (Instrument No. 57). Apache argues that it is not liable for the actions or fault, if any, of Wood Group because Wood Group was an independent contractor. (*Id.*, at 6-7). Apache further asserts that the work performed by Plaintiff for

Apache at issue – carrying his toolbox down a flight of stairs – does not constitute an ultrahazardous activity. (*Id.*). Finally, Apache claims it had no operational control over Wood Croup or its employees, including Plaintiff. (*Id.*, at 8).

Defendant Island Operating Co. moved for summary judgment on September 9, 2008. (Instrument No. 59). Island Operating Co. argues that it is not liable for Plaintiff's alleged injuries because it did not owe Plaintiff a duty of care. (*Id.*, at 8-10). Island further argues that it did not assume a duty to escort Plaintiff while he was disembarking the helicopter. (*Id.*, at 11-12).

Plaintiff responded to Defendant Apache's motion for summary judgment on September 22, 2008. (Instrument No. 61). Plaintiff asserts that Apache is liable for his injuries because Apache failed to institute a policy requiring its operators to assist visiting technicians in loading and unloading equipment. (*Id.*, at 5-6). Plaintiff also contends that any arguments regarding Plaintiff's contributory negligence are not appropriate for disposition on summary judgment. (*Id.*, at 6-7).

Plaintiff responded to Defendant Island Operating Co.'s motion for summary judgment on September 29, 2008. (Instrument No. 63). Plaintiff argues that Island Operating Co.'s failure to institute a policy requiring its workers to provide assistance to visiting technicians resulted in injuries to Plaintiff. (*Id.*, at 5-6). Plaintiff contends that Island Operating Co. assumed

a heightened duty of care to Plaintiff by promulgating an orientation video regarding safety standards. Plaintiff further asserts that Island Operating Co. retained control over the safety aspect of visitors to Apache platforms. (*Id.*, at 6). Finally, Plaintiff asserts that any arguments regarding Plaintiff's contributory negligence are not appropriate for disposition on summary judgment. (*Id.*, at 6-7).

Defendant Island Operating Co. replied to Plaintiff's response on November 24, 2008. (Instrument No. 68). Island Operating Co. argues that it did not owe Plaintiff a heightened duty of care and it did not assume a duty to act, because it never promulgated, showed, or maintained an orientation video. (*Id.*, at 2-3). Island Operating Co. asserts that the orientation video at issue was solely Apache's, and this video did not impose upon Island Operating Co. a duty to meet and assist the Plaintiff. (*Id.*, at 3). Finally, Island Operating Co. contends that it had no control over Wood Group's employees, including Plaintiff. (*Id.*, at 4).

III.

A.

Summary judgment is appropriate if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. A fact is "material" if its resolution in favor of one party might affect the outcome of the suit under governing law. *See Anderson v. Liberty Lobby, Inc.*,

106 S. Ct. 2505, 2510 (1986); *see also United States v. Arron*, 954 F.2d 249, 251 (5th Cir. 1992). An issue is "genuine" if the evidence is sufficient for a reasonable jury to return a verdict for the nonmoving party. *See Anderson*, 106 S. Ct. at 2510. If the evidence rebutting the motion for summary judgment is only colorable or not significantly probative, summary judgment should be granted. *Id.* at 2511; *see also Thomas v. Barton Lodge, Ltd.*, 174 F.3d 636, 644 (5th Cir. 1999). The summary judgment procedure, therefore, enables a party "who believes there is no genuine issue as to a specific fact essential to the other side's case to demand at least one sworn averment of that [specific] fact before the lengthy process continues." *See Lujan v. National Wildlife Federation*, 110 S. Ct. 3177, 3188-89 (1990).

Under Rule 56(c), the moving party bears the initial burden of informing the district court of the basis for its belief that there is an absence of a genuine issue for trial, and for identifying those portions of the record that demonstrate such absence. *See Matsushita Elec. Ind. Co. v. Zenith Radio Corp.*, 106 S. Ct. 1348, 1355-56 (1986); *see also Burge v. Parish of St. Tammany*, 187 F.3d 452, 464 (5th Cir. 1999).

Where the moving party has met its Rule 56(c) burden, the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts . . . [T]he nonmoving party must come forward with specific facts showing that there is a *genuine issue for trial.*'" *See Matsushita*, 106 S. Ct. at 1356 (quoting Fed. R. Civ. P. 56(e)) (emphasis in

original); *see also Celotex Corp. v. Catrett*, 106 S. Ct. 2548, 2552 (1986); *Engstrom v. First Nat'l Bank*, 47 F.3d 1459, 1462 (5th Cir. 1995). To sustain the burden, the nonmoving party must produce evidence admissible at trial. *See Anderson*, 106 S. Ct. at 2514; *see also Thomas v. Price*, 975 F.2d 231, 235 (5th Cir. 1992) ("To avoid a summary judgment, the nonmoving party must adduce admissible evidence which creates a fact issue").

The Court reviews the facts in the light most favorable to the nonmovant and draws all reasonable inferences in favor of the nonmovant. *See Brown v. Bunge Corp.*, 207 F.3d 776, 781 (5th Cir. 2000). "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *See Anderson*, 106 S. Ct. at 2512.

B.

Parties agree that Louisiana state substantive law applies to the instant case. (Instrument No. 57, at 6; Instrument No. 59-4, at 9; Instrument No. 61, at 4). The Outer Continental Shelf Lands Act mandates that the law of the state adjacent to the platform on which the incident occurred governs Plaintiff's claim. 43 U.S.C. § 1333(a)(2). The incident at issue took place on Apache's platform located on the Outer Continental Shelf off the coast of Louisiana. (Instrument No. 57, at 6; Instrument No. 59-7, at 2). Accordingly, Louisiana substantive law applies to Plaintiff's claims.

1.

Defendant Apache argues that cannot be held liable for Plaintiff's injuries because Plaintiff was employed by Wood Group, an independent contractor, and because Apache had no control over Plaintiff's work or actions causing the alleged injuries. (Instrument No. 57, at 7).

"A well-established general rule under Louisiana law is that a principal is not liable for the [torts] committed by an agent who is an independent contractor in the course of performing its contractual duties." *Roberts v. Cardinal Servs.*, 266 F.3d 368, 380 (5th Cir. 2001). However, a principal may be liable if (1) "the activity engaged in by the independent contractor is 'ultrahazardous,'" or (2) "[the principal] maintains operational control over the activity in question." *Id.*

Apache entered into a Master Service Contract ("Contract") with Production Systems LP, Coastal Production Services, RMC Technology LP, Prosafe LP and Operators & Consulting Services Inc. on January 30, 2005. (Instrument No. 57-3). The five latter companies later merged to become Wood Group. (*Id.*, at 1). The Contract demonstrates, and Plaintiff does not dispute, that Wood Group, Plaintiff's employer, was an independent contractor of Apache. (*Id.*, at 2).

To assess Apache's liability for Plaintiff's injury, the Court must first determine if the activity in which Plaintiff was engaged is ultrahazardous. *Id.* Under Louisiana law, an activity may be ultrahazardous either as a matter of law or by classification

under the test that has been created judicially. *Id.* Activities that have been categorized in Louisiana as ultrahazardous as a matter of law are (1) storage of toxic gas, (2) crop dusting with airplanes, (3) pile driving, and (4) blasting with explosives. *Id.* Each of these four undertakings is an activity that "can cause injury to others, even when conducted with the greatest prudence and care." *Id.* (citing *Kent v. Gulf States Utilities*, 418 So. 2d 493, 498 (La. 1982)). Additionally, the jurisprudential test for ultrahazardous activities, outlined in *Perkins v. F. I. E. Corp.*, 762 F.2d 1250 (5th Cir. 1985), maintains that an activity is ultrahazardous if it (1) relates to land or to other immovables; (2) causes the injury, and the defendant was directly engaged in the injury-producing activity; and (3) does not require the substandard conduct of a third party to cause injury. *Id.* (citing *Perkins v. F. I. E. Corp.*, 762 F.2d at 1267-68).

Here, the activity that Plaintiff was engaged in when he became injured – carrying a toolbox down a flight of stairs – is not ultrahazardous as a matter of law in Louisiana because it does not fall under one of the four enumerated categories. Further, this activity is not ultrahazardous under the jurisprudential test because it does not relate to land or to other immovables. Moreover, Plaintiff has even not asserted that this activity was ultrahazardous. Accordingly, the Court finds that Plaintiff was not engaged in an ultrahazardous activity.

The Court must next determine if Apache maintained operational control over Plaintiff's activity in

question – carrying his toolbox down a flight of stairs while disembarking the helicopter. *Id.* Apache, as a principal, is liable for Plaintiff's injuries if Apache contractually reserved the right to control Plaintiff's work. *Fruge v. Parker Drilling Co.*, 337 F.3d 558, 565 (5th Cir. 2003). The Contract between Apache and Wood Group does not grant Apache any control over Wood Group's or Plaintiff's work. (Instrument No. 57-3, at 2). The Contract states that Apache "shall be entitled to make inspections as may be necessary in furtherance of its interest and to determine that the Work is being performed in accordance with the job order." (*Id.*). However, supervisory inspections by a principal do not equate to retention of control over the operations conducted by the independent contractor. *Id.* (citing *Ainsworth v. Shell Offshore, Inc.*, 829 F.2d 548, 550 (5th Cir. 1987), *cert. denied*, 485 U.S. 1034 (1988)).

Operational control may also exist if the principal has direct supervision over the step-by-step process of accomplishing the work such that the contractor is not entirely free to do the work in his own way. *Id.* (citing *LeJeune v. Shell Oil Co.*, 950 F.2d 267, 270 (5th Cir. 1992)). There is no evidence in the record indicating that Apache had such direct supervision over Plaintiff's work. Although Sinclair, an Apache employee, instructed and arranged for Plaintiff to be dispatched to Apache's platform at South Timbalier 295A, these actions do not amount to direct supervision and had no bearing on the "step-by-step process of accomplishing [Plaintiff's work]." *Id.*

(Instrument No. 59-7, at 3). Furthermore, no Apache employee was even present on the Apache platform at South Timbalier 295A at the time Plaintiff allegedly sustained injuries. (Instrument No. 57-2, at 2). "In short, absent an express or implied order to the contractor to engage in an unsafe work practice leading to an injury, a principal . . . cannot be liable under the operational control exception." *Id.* (citing *Coulter v. Texaco, Inc.*, 117 F.3d 909, 912 (5th Cir. 1997)).

Plaintiff argues that Apache is liable for his injuries because it failed to establish a policy requiring its platform operator, Island Operating Co., to provide assistance to visiting technicians. (Instrument No. 61, at 22). Plaintiff further asserts that Apache's failure to "instruct its operators to assist its workers is even more egregious in light of the fact that Apache dispatched Plaintiff to work on the platform and thus *knew that he would need assistance* in unloading his heavy load of tools." (Instrument No. 61, at 6) (emphasis added).

The Court finds that Apache cannot be found liable for Plaintiff's injuries because Wood Group was an independent contractor of Apache and the exceptions discussed above do not apply. Even assuming that Apache did owe a duty of care to Plaintiff, the uncontroverted evidence demonstrates that Apache was wholly unaware that Plaintiff needed assistance in unloading his heavy load of tools. Plaintiff did not ask for assistance in carrying his toolbox when disembarking from the helicopter. (Instrument No. 57-2, at 2; Instrument No. 57-5, at 62). Sinclair, the

Offshore Production Foreman for the Apache platforms located at Grand Isle Block 16 and South Timbalier Block 295A, stated in a declaration that Apache had not given Plaintiff any instructions and had no "knowledge that Mr. Jordan was carrying his toolbox . . . at the time of the alleged accident and injuries." (Instrument No. 57-2, at 2). Plaintiff himself confirmed that no Apache employee knew that he needed assistance carrying his toolbox. (Instrument No. 57-5, at 68).

Accordingly, the Court has viewed the evidence in the light most favorable to the Plaintiff and **GRANTS** Defendant Apache's Motion for Summary Judgment. **(Instrument No. 57).**

2.

Defendant Island Operating Co. asserts that it is not liable for Plaintiff 's alleged injuries because it did not owe Plaintiff a duty to act or assist him with carrying his toolbox. (Instrument No. 59, at 8-10). Island Operating Co. further argues that it had no prior notice that Plaintiff needed assistance with his toolbox, and that it did not assume a duty to escort Plaintiff. (*Id.*, at 11-12).

Louisiana has adopted the duty-risk analysis to determine legal responsibility in negligence tort claims. The requisite elements are: (1) whether the conduct of which plaintiff complains was a cause-in-fact of the harm; (2) whether there was a duty on the part of the defendant which was imposed to protect

against the risk involved; (3) whether there was a breach of that duty; and (4) damages. *Gates v. Shell Oil*, 812 F.2d 1509, 1516 (5th Cir. 1987) (citing *Harris v. Pizza Hut of Louisiana, Inc.*, 455 So. 2d 1364, 1369-70 (La. 1984)).

Island Operating Co. contends that the second element of the duty-risk analysis is absent. Therefore, the relevant inquiry is whether Island Operating Co.'s duty, whatever it may have been, extends to the specific injury Plaintiff allegedly suffered. *Nelson v. Parish of Washington*, 805 F.2d 1236, 1240 (5th Cir. 1986). "A duty is an obligation to which the law will give recognition and effect. The scope of defendants' duty depends upon how far the law's protection will be extended. It is, therefore, an inherently judicial function to determine whether or not there is any legal principle to cover the risk of injury sustained by plaintiffs." *Id.* (citing *Andrus v. Trailers Unlimited, Etc.*, 647 F.2d 556, 559 (5th Cir. 1981)). Duty varies depending on the facts, circumstances, and context of each case and is limited by the particular risk, harm, and plaintiff involved. *Dupre v. Chevron U.S.A.*, 20 F.3d 154, 157 (5th Cir. 1994).

Plaintiff, a Wood Group employee, and Island Operating Co. were separate independent contractors of Apache. (Instrument Nos. 59-5, 59-7, 59-8). Island Operating Co. employees operated Apache's platform located at South Timbalier Block 295A, to which Plaintiff was dispatched to repair a valve in accordance with his responsibilities. (*Id.*). As a general rule, the owner or operator of a platform has "a duty to take

reasonable steps to make and keep its platform safe, for workers thereon. . . . This duty extends to employees of independent contractors, for whose benefit the owner [or operator] must take reasonable steps to ensure a safe working environment." *Dupre*, 20 F.3d at 157-158 ("[W]ork aboard an offshore platform is precarious at best.").

However, the risk that Plaintiff was exposed to – injury from carrying his own toolbox while disembarking a helicopter – is not related to Island Operating Co.'s duty to "make and keep its platform safe for workers thereon." *See Dupre*, 20 F.3d at 157-158. Plaintiff does not allege that his injury was caused by an unsafe working environment or condition on the platform, such as defective stairs or faulty equipment. Rather, Plaintiff argues that Island Operating Co. "failed to provide aid and assistance" to him in carrying his toolbox and failed to institute a policy requiring its workers to provide this assistance. (Instrument No. 63, at 5). Plaintiff references no legal basis for imposing such a duty to act on Island Operating Co. (Instrument No. 63, at 5). Assuming the facts as alleged by Plaintiff, the Court finds that there is no legal basis for imposing a duty on Island Operating Co. for the risk or injury that Plaintiff encountered. Island Operating Co. did not owe Plaintiff a duty to act, assist, or protect him against injury from carrying his own toolbox.

Plaintiff also asserts that Island Operating Co. "assumed a heightened duty of care towards Plaintiff . . . by virtue of the fact that they promulgated an

orientation video relating to the Apache platform." (Instrument No. 63, at 6). Although the evidence shows that Apache provided a safety orientation video for its contractors, this video does not require that anyone on the platforms "automatically greet, assist, or escort an individual who exits a helicopter upon arrival." (Instrument No. 59-10, at 3). Moreover, there is no indication that Island Operating Co. prepared, maintained, or showed this video. (*Id.*). The Court finds that Island Operating Co. did not assume a duty to protect Plaintiff against his alleged injury.

Accordingly, the Court has viewed the evidence in the light most favorable to the Plaintiff and **GRANTS** Defendant Island Operating Co.'s Motion for Summary Judgment. **(Instrument No. 59).**

IV.

The Court has examined the record in the light most favorable to the Plaintiff and **GRANTS** Defendant Apache Corporation's and Defendant Island Operating Co.'s Motions for Summary Judgment. **(Instrument Nos. 57, 59).**

The Clerk shall enter this Order and provide a copy to all parties.

SIGNED on this the 2nd day of March, 2009, at Houston, Texas.

/s/ Vanessa D. Gilmore
VANESSA D. GILMORE
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 09-40414

DAVE JORDAN,

Plaintiff-Appellant

v.

APACHE CORP;
ISLAND OPERATING COMPANY INC,

Defendants-Appellees

Appeal from the United States District Court for the Southern District of Texas, Galveston

---

ON PETITION FOR REHEARING

(Filed Nov. 2, 2009)

Before Circuit Judges REAVLEY, JOLLY, and OWEN.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is denied.

ENTERED FOR THE COURT:

/s/ Thomas M. Reavley
United States Circuit Judge